

BEFORE THE
PUBLIC SERVICE COMMISSION OF WISCONSIN

Commission Review of and Response to the
Federal Communications Commission's Triennial
Review Order Relative to Network Unbundling
Obligations and Related Issues

05-TI-824

**SBC WISCONSIN'S MOTION TO INTERVENE AND COMMENTS
ON ISSUES AND PROCEDURE**

Wisconsin Bell, Inc. d/b/a SBC Wisconsin ("SBC Wisconsin"), pursuant to the Commission's Notice of Investigation dated July 24, 2003 ("Notice") and Wis. Admin. Code § PSC 2.21, hereby: (1) requests full intervention in this docket; (2) and identifies issues and suggests procedures to be used in conducting this docket.

I. MOTION FOR INTERVENTION

SBC Wisconsin is the largest incumbent local exchange carrier (ILEC) in the State of Wisconsin. As the state's largest ILEC, SBC Wisconsin is required to offer unbundled access to its network, pursuant to the terms of 47 U.S.C. §§ 251 and 252.

As the Notice states, this docket is opened in response to the FCC's anticipated Triennial Review Order.¹ The Notice also states that it is anticipated the FCC's order will address various issues regarding unbundled network elements, broadband unbundling obligations, and transport, among other things.

¹ *Review of § 251 Unbundling Obligations of Incumbent Local Exchange Carriers* (CC Docket No. 01-338), *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996* (CC Docket No. 96-98) and *Deployment of Wireline Services Offering Advanced Telecommunications Capability* (CC Docket No. 98-147) (collectively, the "Triennial Review").

SBC Wisconsin provides UNEs, transport and other interconnection services to CLECs in Wisconsin. Accordingly, the manner in which this Commission addresses and implements the FCC's Triennial Review Order will necessarily affect the substantial interests of SBC Wisconsin. Consequently, SBC Wisconsin is entitled to intervene in this docket as a matter of right, pursuant to Wis. Admin. Code PSC 2.21(1). In any event, considering SBC Wisconsin's pervasive ILEC responsibilities in Wisconsin, SBC Wisconsin's intervention will promote the proper disposition of the issues in this proceeding and will not impede the timely completion of this docket. Therefore, SBC Wisconsin should be allowed full intervention pursuant to Wis. Admin. Code PSC 2.21(2) as well.

In the event this motion is granted, SBC Wisconsin request the following persons to be added to the service list:

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II. ISSUES TO BE CONSIDERED AND SUGGESTED PROCEDURE

As previously noted, the FCC's Triennial Review Order has not yet been released, but it appears clear that the FCC rules under which CLECs obtain access to ILECs' unbundled network elements ("UNEs") will change. The Order apparently will require at least two State commission proceedings to determine whether certain network elements must be unbundled in some geographic and product markets. The Commission, in its Notice, requested comments on issues prompted by the FCC's February 20, 2003 releases and possible processes to be used by the Commission to address these issues. The FCC's releases were limited to a Triennial Review Press Release (the "Press Release") and its Attachment (the "Attachment") summarizing the FCC's determinations. Presumably, the

Commission's Notice is requesting comments on the information set forth in the Press Release and the Attachment. SBC Wisconsin provides these Comments as requested to help the Commission plan, prepare, and gather information now that may be needed in the course of concluding this docket. These comments are subject to reconsideration and change based upon the actual content of the Triennial Review Order, and may be revised in subsequent requests for comments made by the Commission.² As set forth in the Notice, the Commission is considering soliciting further comments after the Triennial Review Order is issued. SBC Wisconsin submits that the Commission should, in fact, solicit further comments after the release of the Triennial Review Order and grant all parties the further opportunity to comment.

SBC Wisconsin will address three broad categories of issues prompted by the Press release and the Attachment. These are:

(1) the 90-day proceeding in which CLECs seeking to serve business customers with high-capacity loops may undertake to rebut the FCC's presumptive finding that the unavailability of local circuit switching as a UNE will not impair them in their ability to provide such service;

(2) the nine-month proceeding in which CLECs seeking to serve the mass market may undertake to demonstrate that the unavailability of local circuit switching as a UNE would impair them in their ability to do so; and

² In addition, these comments are subject to changes that may result from an appeal of the Triennial Review Order. Although SBC Wisconsin contended before the FCC that the FCC itself must make, and cannot delegate to the states, the national determination of UNE availability under the federal Telecommunications Act of 1996, the FCC apparently intends to delegate certain UNE declassification functions to the states. SBC Wisconsin participates in these proceedings without waiving its right to challenge that delegation of federal authority, or any other aspect of the Triennial Review Order.

(3) procedures for the orderly implementation of other significant rule changes in the Triennial Review Order.

A. HIGH-CAPACITY BUSINESS LOOP SWITCHING

The Press Release and the Attachment indicate that the FCC has made a nationwide presumptive finding that local circuit switching need not be made available as a UNE by ILECs to competitive local exchange carriers (CLECs) that provide service to business customers with high-capacity loops (described as the “enterprise market”). The basis for the FCC’s presumptive finding is that competition in enterprise markets would not be impaired if the local switching UNE were unavailable. However, the FCC further indicated that each state would have 90 days from the effective date of the Triennial Review Order to rebut the presumption of “no impairment” as it affects that state.

The Press Release and its Attachment provide little guidance on the procedures the Triennial Review Order will suggest or require. All the Attachment says about procedure is:

Local Circuit Switching—The Commission finds that switching—a key UNE-P element—for business customers served by high-capacity loops such as DS-1 will no longer be unbundled *based upon a presumptive finding of no impairment. Under this framework, states will have 90 days to rebut the national finding.*

(Emphasis added.)

The quoted language does, of course, mean that the FCC has made a nationwide presumptive finding that its newest impairment standard³ has not been met with respect

³ According to the Press Release, the Triennial Review Order will provide that impairment exists: “when lack of access to an incumbent LEC network element poses a barrier or barriers to entry, including operational and economic barriers, which are likely to make entry into a market uneconomic. Such barriers include scale economies, sunk costs, first-mover advantages, and barriers within the control of the incumbent LEC. The Commission’s unbundling analysis specifically considers market-specific variations, including considerations of customer class, geography, and service.”

to switching for business customers served by high-capacity loops such as DS-1. Any CLEC that undertakes to rebut this presumption will be obliged to carry the burden of proving impairment with evidence sufficiently substantial to overcome the FCC's presumption.

The Triennial Review Order evidently will provide that TELRIC-priced, section 251 unbundled local switching ("251-ULS") will no longer be available for business customers with high-capacity loops such as DS-1, and that it will remain unavailable unless and until a State concludes in a timely manner that the presumption has been rebutted according to the FCC's standards and guidance. However, the FCC will apparently continue to address separately the availability of circuit switching under federal Telecommunications Act ("FTA") section 271. *See* 47 U.S.C. §§ 201, 202, 271(c)(2)(B)(xi).⁴

The Commission is not required to inquire into the FCC's presumptive finding of non-impairment unless one or more CLECs ask the Commission to institute a proceeding in which the CLECs may attempt to rebut the presumption, including for specific geographic areas. If no CLEC makes such a request or if the Commission does not affirmatively determine that the presumption has been rebutted within 90 days, 251-ULS for business customers served by high-capacity loops will be unavailable. In order for the Commission to be prepared to address any issues relating to the presumptive elimination of 251-ULS for business customers served by high-capacity loops, SBC

⁴ The Attachment provides: "Section 271 Issues – The requirements of section 271(c)(2)(B) establish an independent obligation for BOCs to provide access to loops, switching, transport, and signaling, under checklist items 4-6 and 10, regardless of any unbundling analysis under section 251. Where a checklist item is no longer subject to section 251 unbundling, section 252(d)(1) does not operate as the pricing standard. Rather, the pricing of such items is governed by the 'just and reasonable' standard established under sections 201 and 202 of the Act." *Id.*

Wisconsin proposes the following in advance of the release of the Order (but conditional upon the actual terms of the Order):

- It would be appropriate for the Commission to establish a deadline (*e.g.*, five business days after release of the Triennial Review Order⁵) by which any CLEC that seeks to rebut the presumption of non-impairment must request that the Commission conduct a proceeding for that purpose.
- The Commission should determine that if one or more CLECs request a 90-day proceeding to rebut the presumption of non-impairment, the proceeding will be generic, applicable to all certified ILECs and CLECs in Wisconsin. The generic proceeding must comport with the standards and procedures that the FCC and federal law require.
- It will be important for the Commission to hear from CLECs that do not use unbundled local switching to provide service to business customers served by high-capacity loops. Accordingly, assuming a case is initiated, the Commission should make all certified CLECs parties to the case, or at least subject to discovery, so that the Commission can consider all sources of evidence regarding lack of impairment.
- The Commission should provide notice that any CLECs that seek to rebut the presumption of non-impairment must (1) coordinate with the incumbent carriers to develop a joint list of “decision points,” *i.e.*, points that the Commission must address in order to resolve the questions

⁵ It remains to be seen whether the 90-day period within which the Commission must complete its work will commence on the date the FCC releases its Order, the date the Order is published in the Federal Register, or some other effective date designated in the Order. In any event, SBC Wisconsin recommends that the request deadline for the 90-day proceeding be keyed to the release of the Order.

presented; (2) bear the burden of production (both of information in discovery and evidence in any hearing) and proof on the question of impairment; and (3) timely comply with discovery requests.

- In addition to standard discovery, and in order to expedite the gathering of the information it will need in order to resolve the issues presented in the 90-day proceeding, the Commission should consider using the questionnaire process outlined in Wis. Stats. 196.25(3) to gather necessary information. Every certified CLEC in Wisconsin would be required to respond to the questionnaire promptly, perhaps 20 days. CLECs failing to timely answer the questionnaire should be subject to any and all penalties available under Chapter 196. Attached hereto as Exhibit A is an initial set of topics for data requests that the Commission should consider in developing such a questionnaire. It may, of course, be appropriate for the Commission to seek additional information from CLECs, based upon direction provided in the Triennial Review Order. At this point, however, requiring all CLECs to provide responses to a generic questionnaire would be a good head start in conducting this initial ninety day proceeding. Further questionnaires, requiring additional information, should be considered, as necessary.
- In addition to the questionnaire, party-to-party data requests should also be permitted. Due to the expedited nature of the proceeding, however, SBC Wisconsin believes it would be appropriate for the Commission to establish a deadline (*e.g.* ten days after release of the Triennial Review

Order) for service of data requests. For the same reason, similarly situated parties (e.g., ILECs and CLECs that seek to rebut the presumption of non-impairment) should be required to collaborate on the preparation of data requests, so that no party is unnecessarily burdened with duplicative requests from similarly situated parties.

- SBC Wisconsin proposes the following framework for a reasonable procedural schedule:⁶

<u>Day</u>	<u>Activity</u>
20	Direct testimony and other evidence filed by CLECs
35	Response testimony and other evidence filed by ILECs
40	Reply testimony and other evidence by CLECs
47-49	Hearings
63	Initial briefs
70	Reply briefs
90	Commission Order

Given the importance of the issue to be decided and the tight time constraint the FCC will apparently impose, the proceeding should be designed to ensure an efficient but thorough and thoughtful resolution of CLEC attempts to rebut the national presumption that the unavailability of 251-ULS will not impair competition by CLECs seeking to serve businesses with high-capacity facilities. To that end:

- The proceeding should be a generic case applicable to all Wisconsin CLECs and ILECs. Given the substantial amount of work that will be

⁶ This proposed framework is necessarily subject to modifications to account for (for example) Triennial Review proceedings in other states, weekends and holidays, and other Commission business. In particular, it may be necessary to coordinate the schedule for this proceeding with the schedules for similar proceedings in other states.

required, SBC Wisconsin strongly urges the Commission to consider adopting procedures that will be applicable to all affected carriers.

Although the Commission may be called upon to make some carrier-specific or region-specific determinations, there will surely be sufficient commonality to make a single, generic proceeding more efficient and fair than multiple proceedings, which would inevitably entail unnecessary duplication and possible inconsistencies.

- The conduct of a generic proceeding does not preclude the making of individualized determinations for different carriers (or classifications of carriers) in different regions. The extent to which such individualized determinations is appropriate presumably will be determined by the actual content of the FCC's Order.
- A CLEC that seeks to rebut the presumption of non-impairment will be required to make an evidentiary showing sufficiently substantial to overcome the presumption.
- The parties should pre-file testimony, but the Commission's determination should be based upon an evidentiary record developed through a hearing at which the witnesses may be cross-examined. The inquiry that the Commission will be undertaking is intensively factual, and cross-examination is a cornerstone in the process by which factual determinations are appropriately made.

The FCC's Order may provide additional guidance on the appropriate procedures to use, and SBC Wisconsin will work with the Commission and CLECs to implement appropriate procedures.

Despite the tight time frames associated with the 90-day proceedings, the Commission should resist any suggestion that it combine the Wisconsin 90-day proceeding with similar investigations in other states, for three reasons.

First, the time and energy the Commission would have to expend to effectively combine its 90-day proceeding with the 90-day proceedings of other State commissions would likely outweigh any efficiencies the Commission might gain – assuming that such a combination could be achieved at all.

Second, the Commission should not place itself in a position where its ability to timely complete the 90-day proceeding would be dependent on the actions of other State commissions.

Third, it is reasonably likely that the decision the Commission renders in its 90-day proceeding will be appealed, and combination with the proceedings of other State commissions could make the Commission's decision vulnerable on appeal.

It may well be necessary, however, to coordinate the schedule of the Wisconsin 90-day proceeding with the schedules of similar investigations in other states in order to avoid conflicts for witnesses and other participants in the proceedings.

SBC reserves its rights to raise additional issues and/or submit further suggestions as to process after the FCC releases its Triennial Review Order.

B. MASS MARKET LOOP SWITCHING

The FCC's February 20, 2003 announcement indicated that the rule changes will discontinue the requirement to offer local switching as a UNE for purposes of serving the "mass market." However, the FCC further indicated that state commissions will have nine months to make individual findings as to whether the mass market would be impaired by such discontinuation. The FCC's decision as to mass market switching raises some serious issues; several of them substantially different than the issues pertinent to the 90-day proceeding.

Initially, it must be noted that the nine-month time limitation upon the mass-market ULS proceeding is both less demanding and more daunting than that of the 90-day proceeding. Although the timeline is extended, the volume of information that must be gathered and processed for the Commission to issue its determination of impairment or a lack of impairment is extraordinary. According to the Attachment to the Press Release, the Triennial Review Order will set forth "[f]or mass market customers, . . . the specific criteria that states shall apply to determine, on a granular basis, whether economic and operational impairment exists in a particular market."

CLEC proponents of unbundling will bear the burden of producing evidence and the ultimate burden of proof. To make production, presentation, examination, and testing of the information to be produced as manageable and orderly as possible, SBC Wisconsin proposes that in advance of the release of the Order (but again, subject to modification based upon the actual terms of the Order), the Commission consider adopting a discovery protocol aimed at obtaining the information needed to make the determinations the Commission evidently will be required to make. In addition, the sheer volume of

material to be gathered practically demands that the Commission avail itself of the questionnaire process outlined in Wis. Stats. 196.25(3). Indeed, the Commission should view the questionnaire process as the primary (but not exclusive) means used to fill out a record on the availability of competitive alternatives to unbundled incumbent switching facilities as well as other information pertaining to CLEC contentions of operational or economic impairment, within the standards to be set forth in the Order. Attachment A is offered for this purpose as well as for purposes of the 90-day proceeding. It may, of course, be appropriate for the Commission to seek additional information from CLECs, based upon direction provided in the Triennial Review Order. At this point, however, requiring all CLECs to provide responses to a questionnaire based upon the attached set of initial data requests would be a good start. Of course, such a questionnaire should be an addition to, and not a replacement for, standard discovery tools available under Chapter 196 and the Wisconsin Administrative Code.

In addition to those recommendations concerning discovery, SBC Wisconsin suggests that the following recommendations, set forth above in connection with the 90-day proceeding, pertain here as well:

- The proceeding should be generic and applicable to all certified ILECs and all CLECs in Wisconsin. The generic proceeding must comport with the standards and procedures that the FCC and federal law require.
- It will be important for the Commission to hear from CLECs that do not use unbundled local switching as well as from those that do. Accordingly, the Commission should make all certified CLECs parties to the case or, at the very least, subject to discovery.

- The Commission should provide notice that CLECs that allege competition is impaired if CLECs do not have unbundled access to circuit switching must (1) coordinate with the incumbent carriers to develop a joint list of “decision points,” *i.e.*, points that the Commission must address in order to resolve the questions presented; and (2) bear the burden of production (both of information in discovery and evidence in any hearing) and proof on the question of impairment.
- SBC Wisconsin proposes the following framework for a reasonable procedural schedule:⁷

<u>Day</u>	<u>Activity</u>
35	Direct testimony and other evidence filed by CLECs
70	Response testimony and other evidence filed by LECs
90	Reply testimony and other evidence by CLECs
130-135	Hearings
160	Initial briefs
190	Reply briefs
220	Proposed Order
240	Objections to Proposed Order
270	Commission Order

For the reasons set forth above in connection with the 90-day proceeding, SBC Wisconsin recommends against attempting to combine the Wisconsin nine-month proceeding with similar investigations in other states. It may be necessary, however, to coordinate the schedule of the Wisconsin proceeding with the schedules of similar

⁷ This proposed framework is necessarily subject to modifications to account for (for example) Triennial Review proceedings in other states, weekends, and other Commission business. In particular, it may be necessary to coordinate the schedule for this proceeding with the schedules for similar proceedings in other states.

investigations in other states in order to avoid conflicts for witnesses and other participants in the proceedings.

SBC Wisconsin also recommends that the Commission not adopt a procedure for incorporating or otherwise adopting the records of similar proceedings in other states. Even setting aside questions having to do with the relevance of such evidence, there should be no need for any such procedure. To the extent that a party might want to use in Wisconsin the direct testimony or evidence that it provided in another state, it can readily do so by simply repeating the testimony or evidence – there is no efficiency to be gained by an incorporation by reference. And to the extent that a carrier might want to make use of evidence it adduced from another party in another state (by cross-examination, for example), that evidence can be offered and either admitted or not according to the rules set forth in Chapters 196 and 227 – again, there is no need to make any special provision for an incorporation by reference.

C. OTHER RELEVANT ISSUES

The FCC's February 20, 2003 announcement highlights other significant rule changes. For example, the FCC has indicated that the Triennial Review order will: 1) clarify total element long-run incremental cost rules for purposes of UNE pricing; 2) make transitional provisions to allow for the conversion of UNEs to special access; 3) require shared transport; and 4) permit the commingling of UNEs and other wholesale services such as special access. These issues should be addressed by the Commission, to the extent required by the Triennial Review Order.

Specifically, the Attachment to the FCC Press Release states that:

- “The [FCC] makes a national finding of impairment for DS1, DS3, and dark fiber loops, *except where triggers are met as applied in state proceedings. States can remove DS1, DS3, and dark fiber loops based on a customer location-specific analysis applying a wholesale competitive alternatives trigger.*” Attachment at 2 (emphasis added).
- “*Dark fiber and DS3 loops also each are subject to a customer location-specific review by the states to identify where loop facilities have been self-deployed.*” *Id.* (emphasis added).
- “[R]equesting carriers are impaired without access to dark fiber, DS3 and DS1 transport, *except where wholesale facilities triggers are met as applied in state proceedings using route-specific review.*” *Id.* at 3 (emphasis added).
- “*Dark fiber and DS3 transport also are each subject to a granular route-specific review by the states to identify where transport facilities have been self-deployed.*” *Id.* (emphasis added”).

The Commission should make the determinations concerning high-capacity loops, dark fiber and dedicated transport that are called for in the foregoing language (as revised in the Triennial Review Order) in the nine-month proceeding concerning switching for mass market loops, using the same procedures outlined above in Section II. B.

Respectfully submitted August 4, 2003.

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